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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the Supreme Court of the State of North Carolina is reported in 224 N. C. Page 714 (R. 31).

Jurisdiction

I

The date of the judgment to be reviewed is December 13, 1944 (R. 41).

II

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237 of the Judicial Code as amended by the Act of February 13, 1925.

III

The facts, as set forth in the Petition for Certiorari, are that the plaintiff and persons on behalf of whom he prosecutes this action are elevator operators, firemen, janitors, cleaners and other service employees of the eighteen story office building owned by the defendant, 30% of which is occupied by the Southern Bell Telephone and Telegraph Company engaged in interstate communication and transmission, and a large part of the remainder of the said building is occupied by persons engaged in interstate commerce, and this action is to recover overtime compensation, liquidated damage, interest, etc. under the U. S. statute known as the Fair Labor Standards Act of 1928, 29 USCA 201-219, and the action of the Court below in denying the plaintiffs' recovery under the said Act is contrary to the provisions of the said Act and to the decision of the United States Supreme Court with reference thereto in the case

of *Kirschbaum v. Walling*, 316 U. S. 517, 86 L. Ed. 1638 and *Walton v. Southern Package Corporation*, 88 L. Ed. 220 (Advance Sheets 88, No. 5). In the *Kirschbaum* case above cited this Court held that service employees, that is to say, persons rendering the same service to a loft building whose tenants were engaged in the production of goods for interstate commerce as the plaintiffs here rendered with reference to interstate communication and interstate commerce, and the Court there held "In our judgment the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore, so much an essential part of it that the employees are to be regarded as engaged in occupation necessary to the production of goods for commerce."

In the case of *Walton v. Southern Package Corporation*, 88 L. Ed. 220, the employee there was engaged as a night watchman in a veneering plant in Mississippi, and performed no acts which brought him within the actual duties of making goods and products for commerce, and the State Court of Mississippi denied recovery under the Fair Labor Standards Act, but on appeal to the Supreme Court of the United States the Supreme Court of Mississippi was reversed and recovery was permitted.

We most respectfully submit, therefore, that the plaintiff in this case is as intimately and closely connected with and is as much a part of interstate commerce and interstate communication and transmission as were the employees in the *Kirschbaum* case and the *Mississippi* case, and that therefore, the decision of the North Carolina Supreme Court is in conflict with the decisions of this Court in these two cases.

IV

The cases believed to sustain jurisdiction are the cases above cited of *Kirschbaum v. Walling*, 316 U. S. 517, 86 L.

Ed. 1638 and *Walton v. Southern Package Corporation*, 88 L. Ed. 220, (Advance Sheets 88, No. 5).

Statement of Case

Statement of the facts and events of this case have heretofore been stated in this Brief and in the Petition, which is hereby attached and made a part hereof.

Specification of Errors

I

The Supreme Court of the State of North Carolina erred in holding that the plaintiff and his associate employees of the defendant as service employees engaged in the defendant's eighteen story office building as firemen, janitors, elevator operators, cleaners and other service employees, 30% of which building was occupied by the Southern Bell Telephone & Telegraph Company engaged in interstate communication and transmission, and a large part of the remainder of the said building occupied by persons engaged in interstate commerce, could not recover under the Fair Labor Standards Act of 1938 and denied the plaintiffs their right under the Federal Statute known as the Fair Labor Standards Act of 1938 hereinbefore cited.

It appears from said petition that there is but one question involved here, and that is whether service employees of an office building 30% of which is occupied by the Telephone Company engaged in interstate communication and transmission and a large part of the remainder occupied by persons, firms and corporations engaged in interstate commerce, are in the same category under the Fair Labor Standards Act of 1938, as are the employees of a loft building wherein goods are manufactured for interstate commerce, as held by *Kirschbaum v. Walling*, supra, and a night watchman engaged in a veneering plant where his only

duties were that of watching the plant at night, as held by this Court in *Walton v. Southern Package Corporation*, 88 L. Ed., 220.

Your petitioners most respectfully contend that there is no distinction pointed out in that statute, and that under the decision of the Court in *Kirschbaum* and *Walton* cases, these employees of this office building of the defendant here are brought within the purview and are entitled to the protection and benefits of the Fair Labor Standards Act, and that the judgment of the Supreme Court of the State of North Carolina ought to be reversed, and these employees permitted to recover overtime compensation, liquidated damage, interest and Attorney's fees for which they bring this action and as provided by the Fair Labor Standards Act of 1938, being an Act of the Congress of the United States approved on the 25th day of June 1938, in 28 USCA 201-219.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the decision.

J. F. FLOWERS,
Counsel for Petitioner.

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